BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CLAUDINE SCHLABACH	)	
Claimant	)	
VS.	)	
	)	Docket No. 198,828
CONTEMPORARY INDUSTRIES SOUTHERN	)	
Respondent	)	
	)	
and	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge (ALJ) John D. Clark's Order dated February 15, 2002. The Appeals Board (Board) heard oral arguments August 16, 2002 in Wichita, Kansas.

APPEARANCES

Walter E. Craig of Wichita, Kansas, appeared for the claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award. In addition, the record also contains the May 6, 1998 report of the court-ordered independent medical examination by Dr. Kenneth Jansson, [1] and the September 23, 1998

[1] P.H. Trans. (July 16, 1998) Ex. 2.

History & Physical Exam and Procedure Note reports by Dr. Keith Green, [2] whose examination of claimant was performed pursuant to the recommendation and request of Dr. Jansson for purposes of his court-ordered independent medical examination.

ISSUES

What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the Award entered by the ALJ should be modified to impute a post-injury wage to claimant based on her ability earn wages, but should otherwise be affirmed.

Respondent argues that the ALJ erred because the preponderance of the evidence supports that claimant sustained injury and disability to only her left lower extremity. The Board must first determine whether the claimant should have been compensated for a permanent partial general disability or for a scheduled injury to the left lower extremity only. Under the Kansas Workers Compensation Act, K.S.A. 44-501, *et. seq.,* injuries such as claimant's, which do not result in death or total disability, may be compensated either as permanent partial general disabilities, K.S.A. 44-510e (Furse 1993), or as scheduled injuries, K.S.A. 44-510d (Furse 1993). If an injury is listed in the K.S.A. 44-510d (Furse 1993) schedule of injuries, then compensation for the injury and resulting disability is limited to those benefits set forth in K.S.A. 44-510d (Furse 1993). Pursuant to K.S.A. 44-510e (Furse 1993), the ALJ determined that claimant sustained a permanent partial general disability as a result of her two work-related accidents. In particular, the ALJ found that claimant suffers from an 11 percent whole body functional impairment and 77 percent work disability attributable to the accidents.

The Board finds that the preponderance of the credible medical evidence supports that claimant sustained a permanent partial general disability as the result of her work-related injury. According to *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, Syl. ¶ 2, 548 P.2d 746 (1976), "[W]hen a workman's injury results in objective physical damage to a member of his body which is included in the schedule under K.S.A. 44-510d such injury may not preclude compensation for general bodily disability if an unscheduled part of his body also becomes disabled as a direct and natural consequence of the physical damage to the scheduled member." Under *Reese*, in order for claimant to be entitled to a finding of general bodily disability, she had to prove that, as a result of her

[2] P.H. Trans. (Dec. 1, 1998) Ex. 1.

knee injury, she suffered functional disability to an unscheduled part of her body. [3] The Board has reviewed the record in this case and finds that claimant sustained this burden through the expert medical opinions of Dr. Philip Mills and Dr. Pedro Murati as well as through her own testimony. [4]

Dr. Murati gave an impairment rating to claimant's back and related claimant's back pain to her work-related knee injury. Similarly, Dr. Mills testified that on examination, he found claimant had pain and tenderness in her back and groin areas as well as in her leg, although Dr. Mills stated that an altered gait was only a possible cause of claimant's low back pain. He also diagnosed general chronic pain syndrome and he related all of his impairment rating to the work-related accidents based upon a reasonable degree of medical probability. As Dr. Mills pointed out, the spinal cord stimulator was installed for both the reflex sympathetic dystrophy (RSD) and general chronic pain syndrome. And Dr. Mills' three percent permanent impairment rating "to the body as a whole" was for the "RSD, general chronic pain syndrome, and the insertion of the stimulator" in the spinal column area. [5] Finally, claimant's testimony also supports a finding that she had an altered gait which caused or contributed to her back pain.

The ALJ determined that claimant was entitled to work disability benefits. In doing so the ALJ found "that at the present time the claimant is unable to search for a job and become employable, and therefore has a wage loss of 100 percent. [6] The Board disagrees with this reasoning. If claimant is unable to search for a job then she is totally disabled. But claimant neither requests additional weeks of temporary total disability compensation nor argues for a permanent total disability award. Rather, claimant asks the Board to affirm the ALJ's award of a 77 percent permanent partial general disability (work disability).

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e (Furse 1993), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year

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[3] *See Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[4] *See Webber, f/k/a Schwarzkopf v. Automotive Controls Corp.*, ___ Kan. ___, 35 P.3d 788 (2001); *Smith v. Cudahy Packing Co.*, 145 Kan. 36, 64 P.2d 582 (1937).

[5] Mills Depo., Ex. 2.

[6] ALJ's Award at 7.

> period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk* and *Copeland*.[7] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

Following claimant's termination by respondent, the record does not support that claimant diligently sought work in the open labor market. Claimant argues that work was not available that would have accommodated her medical restrictions and that she was not capable of working full time before her spinal cord stimulator was installed for pain control and her medications were stabilized. The Board acknowledges that the spinal cord stimulator was first installed by Dr. Sollo on July 29, 1999, and that claimant underwent another surgery on September 14, 2001, just a month before the Regular Hearing. Although claimant's physical condition and medical restrictions were in a state of flux before the Regular Hearing, claimant nevertheless failed to prove that she made a good faith effort to obtain employment post-injury as required by *Copeland*.

But as the Kansas Court of Appeals reaffirmed in *Watson,*[8] the absence of a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, in such circumstances a post-injury wage should be imputed for the permanent partial general disability formula

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

based upon all the evidence, including expert testimony concerning the worker's ability to earn wages.

Nonetheless, respondent argues claimant's permanent partial general disability should be limited to her functional impairment rating as the claimant's termination was unrelated to her work-related injuries.

In January 1998, the Kansas Court of Appeals decided *Gadberry*. [9] In that decision, the Court of Appeals held that a worker who returned to work at her pre-injury wage but within a few weeks was terminated in a layoff was not precluded from receiving a work disability award. Moreover, the Court of Appeals noted that there was no evidence that the employer was accommodating the worker with a light-duty job. [10] The Court stated, in part:

> Gadberry's return to work at the same wage that she had been receiving prior to her [January 21, 1994] injury does not preclude a finding of wage loss since she was given notice of her termination just a few weeks later, and the termination was based on an economic layoff. Pursuant to *Lee*, Gadberry became eligible for compensation on a work disability upon her termination, one component of which is wage loss. [11]

In addressing whether the principles in *Foulk* should preclude claimant from receiving a work disability, the Court stated:

> Gadberry would have continued to work at Polk if she had not been terminated. The record reflects that Gadberry applied for retirement benefits subsequent to her termination because she needed health insurance. Even after she had applied for retirement benefits, Gadberry sought employment with numerous employers within the community. Gadberry did not refuse employment it was never offered to her. [12]

Consequently, in *Gadberry* the Court of Appeals held that the worker was entitled to receive a work disability after she was terminated in an economic layoff despite returning to her regular work without accommodations.

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[9] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[10] *Id.* at 804.

[11] *Id.* at 805.

[12] *Id.* at 806.

In the 1999 *Niesz* [13] case the Kansas Court of Appeals held that a worker was entitled to receive a work disability when the worker was later terminated for reasons that were unrelated to the work injury. In that decision, the Court of Appeals held that an accommodated job artificially circumvents a work disability but once that accommodated job ends, the presumption of no work disability may be rebutted.

> Placing an injured worker in an accommodated job artificially avoids work disability by allowing the employee to retain the ability to perform work for a comparable wage. Once an accommodated job ends, the presumption of no work disability may be rebutted. [14]

> The presumption of no work disability is subject to reevaluation if a worker in an accommodated position subsequently becomes unemployed. [15]

Consequently, the Court of Appeals held that Ms. Niesz was entitled to receive a work disability after being fired, when the circumstances surrounding the termination do not demonstrate bad faith on the worker's part.

> The fact that Niesz' accommodated position ended does not mean that Niesz ceased having work restrictions. Niesz' work disability made it difficult for her to find work in the open market. The presumption of no work disability does not apply because Niesz is no longer earning 90 percent of her preinjury wages. See. K.S.A. 1998 Supp. 44-510e(a) . . . . [16]

Finally, in January 2003 the Kansas Court of Appeals in *Cavender* [17] held that a worker who had obtained other employment following a work injury was entitled to receive work disability benefits after resigning her employment for reasons unrelated to the injury. The Court reasoned that the proper test to apply in these situations is whether the worker acted in good faith to retain appropriate employment and when terminated, thereafter made a good faith effort to find appropriate employment. The Court wrote, in part:

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[13] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[14] *Id.* at Syl. ¶ 2.

[15] *Id.* at Syl. ¶ 3.

[16] *Id*. at 740.

[17] *Cavender v. PIP Printing, Inc.*, ___Kan. App.2d ___, 61 P.3d 101 (2003).

> K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability[.]
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> . . . .
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> The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded.
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> The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis . . . . [18]
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> . . . .
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> The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. **In situations where post injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable.** Clearly, in the cases cited by PIP [the employer], leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. **However, the reasonableness of leaving employment is not limited to a decision based on work restrictions or injuries.**
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> The present case is closest in nature, while still not on point, to those cases where an injured employee is terminated due to economic downturn and layoff and the employee is found to still be entitled to work disability. **Those cases present a situation where termination or leaving employment is unrelated to the workers compensation injury or restrictions**. [19]

And the Kansas Court of Appeals has consistently held that factors other than a worker's injury and permanent medical restrictions may be considered in determining whether a worker has acted in good faith to retain or to find employment. [20]

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[18] *Id.* at 103-104 (citations omitted).

[19] *Id.* at 105 (citation omitted) (emphasis added).

[20] *See Ford v. Landoll Corp.*, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* 269 Kan. ___ (2000).

In this case, the Board finds claimant did not fail to act in good faith with respondent. Accordingly, her termination does not preclude her from receiving a work disability. Furthermore, claimant's ultimate permanent restrictions would prevent her from performing her former job with respondent and it is unlikely respondent could have and would have accommodated her restrictions.

Two vocational experts testified concerning claimant's ability to earn wages post-injury. Claimant's expert, Mr. Jerry Hardin, opined that claimant retained the ability to earn $6 an hour or $240 per week. Respondent's vocational expert, Ms. Karen Terrill, believed claimant could earn $8 an hour or $320 per week. The Board notes that most of claimant's employment before her last job working for respondent were at or near the $6 per hour level. Considering her education and job skills, together with her medical restrictions, the Board finds that Ms. Terrill may have overstated claimant's ability. Conversely, given claimant's managerial experience and bookkeeping training, Mr. Hardin probably understates claimant's ability. Claimant's actual ability lies somewhere between these two opinions. Therefore, the Board will average the two opinions and find claimant retains the ability to earn $7 per hour or $210 per week and will impute this wage to her until such time as circumstances change and she either establishes that she is making a good faith effort to find employment or obtains employment and begins earning actual wages in the open labor market. Comparing claimant's imputed post injury wage of $280 per week to claimant's average wage $312.33, results in a wage loss of 10.4 percent. When averaged with her 54 percent task loss this results in a 32.2 percent work disability.

Award

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated February 15, 2002, is modified as follows:

Claimant is granted an award of workers compensation benefits from respondent, its insurance carrier for the February 23, 1994 and January 27, 1995, accidents and resulting disability. Based upon an average weekly wage of $312.33, claimant is entitled to receive 158.00 weeks of temporary total disability compensation at $208.23 per week, or $32,900.34, followed by 87.58 weeks of permanent partial disability compensation at $208.23 per week or $18,236.78, for a 32.2 percent permanent partial general disability and a total award of $51,137.12, all of which is due and owing and is ordered paid in one lump sum less any amount previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above and, in addition, approves claimants contract of employment with her attorney.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and Insurance Carrier
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation